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In the Supreme Court of the United States

MCWANE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial of cross-petitioners when the court of appeals reversed their convictions because it determined that the jury instructions, although in accord with circuit precedent at the time, were incorrect under the intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), and the court made no finding whether the evidence was sufficient under the standard that it interpreted *Rapanos* to establish.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 505 F.3d 1208.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on March 27, 2008 (Pet. App. 42a-59a). On June 14, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 25, 2008. On July 18, 2008, Justice Thomas further extended the time to and including August 22, 2008. The government's petition for a writ of certiorari in No. 08-223 was filed on August 21, 2008. The conditional

[1] All references to "Pet. App." are to the appendix in No. 08-223.

cross-petition for a writ of certiorari was filed on September 22, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, cross-petitioners were convicted under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), of conspiring to knowingly discharge pollutants into the waters of the United States and of a variety of substantive violations of the Act. Cross-petitioner McWane, Inc., was sentenced to 60 months of probation and a $5 million fine; cross-petitioner Delk to 36 months of probation and a $90,000 fine; and cross-petitioner Devine to 24 months of probation and a $35,000 fine. The court of appeals reversed the convictions and remanded for a new trial. Pet. App. 1a-41a.

1. The underlying facts are fully set forth in the government's petition for a writ of certiorari (08-223 Pet. 2-14) and will only be briefly restated here. The Clean Water Act makes it a felony knowingly to discharge any pollutant into "navigable waters" without complying with the requirements of the Act. 33 U.S.C. 1311(a), 1319(C)(2)(A), 1362(12)(A). The CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Cross-petitioner McWane is a manufacturer of cast iron pipes, and cross-petitioners Delk and Devine are two high-level managers at McWane's Birmingham plant. Pet. App. 2a-3a.

Over a period of years, McWane, in violation of its CWA permit, regularly discharged large quantities of untreated contaminant-laden wastewater from the plant into Avondale Creek, a perennial stream that feeds into traditional navigable waters. Pet. App. 3a-6a. McWane's CWA permit for the plant authorized the discharge of specified amounts of treated industrial wastewater from one discharge point (DSN001) and the discharge of stormwater runoff from other discharge points (DSN002-DSN020). *Id.* at 5a. Instead of fixing the broken wastewater treatment system at the plant, Delk and Devine ordered employees to pump untreated, contaminated wastewater directly into Avondale Creek through the points authorized for discharge of stormwater runoff. *Id.* at 6a-7a.

The untreated wastewater accumulated in the plant's basements, the contents of which employees described as "nasty" and including sand cores, scrap metal, oil, "blacking," and soap, and the basements had to be pumped out weekly so that pipe manufacturing could continue. Pet. App. 6a; Tr. 969-972, 1160, 1785, 1882-1183, 3696. The pollutant levels in the discharges greatly exceeded the levels authorized by the CWA permit for discharges through DSN001 for oil and grease, which coats waterways and can reduce oxygen levels in water. Tr. 204, 226-227, 241, 248, 349, 490, 873; GX 56-003. The discharges also contained high levels of zinc, a metal that is toxic to aquatic life. Tr. 254, 273, 490-491; GX 33-003; GX 55-003. The discharges created a deposit on the bottom of the stream that resembled "white baby powder" and contained high levels of zinc, cadmium, and other metals. Tr. 568-569, 1401-1402; GX 107-003; GX 108B-002.

Delk and Devine knew that the discharges violated the plant's CWA permit, and they instructed the employees to conceal the violations by (*inter alia*) pumping at night and during rainstorms and to mislead regulators about the nature of the discharges. Pet. App. 6a-7a; Tr. 526, 1214-1215, 2747-2748, 2668-2669, 2890-2891.

Cross-petitioners were charged with multiple substantive CWA violations and one count of conspiracy to violate the CWA. Pet. App. 7a-8a. At trial, the district court, in accordance with the Eleventh Circuit's then-controlling decision in *United States* v. *Eidson*, 108 F.3d 1336, cert. denied, 522 U.S. 899, and 522 U.S. 1004 (1997), instructed the jury that a "water of the United States" includes any stream—whether it flows continuously or only intermittently—that may eventually flow into traditional navigable waters. Pet. App. 11a-12a. The district court had made clear far in advance of trial that it would employ that definition throughout the case. *Id.* at 32a.

After a six-week trial, the jury found cross-petitioners guilty of, *inter alia*, multiple substantive CWA violations and one count of conspiracy to violate the CWA. Pet. App. 8a-9a.

2. The court of appeals reversed the convictions in light of this Court's intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), and remanded for a new trial. Pet. App. 1a-41a. The court of appeals held that Justice Kennedy's concurring opinion in *Rapanos* provides the legally controlling definition of "navigable waters" or "waters of the United States" as those terms are used in the CWA. *Id.* at 13a-25a. The court further held that the jury instructions did not embody Justice Kennedy's standard, which the court understood to require proof that a "water or wetland" has a "significant

nexus" to traditional navigable waters. *Id.* at 17a, 25a-26a. And the court held that the instructional error was not harmless. *Id.* at 26a-28a.

The court of appeals rejected cross-petitioners' claim that the instructional error entitled them to judgments of acquittal, rather than a new trial. Cross-petitioners argued that the evidence was insufficient to show that they had discharged the polluted wastewater into "a *Rapanos*-defined 'navigable water.'" Pet. App. 31a-32a. The court observed, however, that the evidence was sufficient to show that the discharges were into a "navigable water" as erroneously defined by the district court and that cross-petitioners made no claim of evidentiary insufficiency under that standard. *Id.* at 31a. The court then held that it "need not evaluate whether there was insufficient evidence that [cross-petitioners'] discharges were into 'navigable waters' as that term is properly defined under *Rapanos*." *Id.* at 31a-32a.

The court explained that, under *United States* v. *Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), overruled on other grounds by *Bryan* v. *United States*, 524 U.S. 184 (1998), cross-petitioners would not be entitled to judgments of acquittal, regardless of whether the evidence was sufficient under the new *Rapanos* standard. Pet. App. 31a. *Sanchez-Corcino*, the court noted, held that "[r]emand for a new trial is the appropriate remedy where . . . [any] insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency." *Ibid.* (quoting *Sanchez-Corcino*, 85 F.3d at 554 n.4). That was the situation here, the court explained, because the district court had made clear well in advance of trial the definition of "navigable water" that it

would employ, and the district court's decision "deprived the government of any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's 'significant nexus' test." *Id.* at 32a.

3. After the court of appeals denied petitions for rehearing filed by both the government and cross-petitioners, Pet. App. 42a-43a, the government filed a petition for a writ of certiorari. The government's petition argues that the court of appeals erroneously identified the controlling rule of law established by *Rapanos*, misinterpreted this Court's precedents governing how to interpret fractured decisions, and created a circuit conflict that warrants immediate review. 08-223 Pet. 14-32. Cross-petitioners then filed the instant conditional cross-petition for a writ of certiorari.

ARGUMENT

Cross-petitioners contend (Pet. 5-15) that the Double Jeopardy Clause bars their retrial on the Clean Water Act charges because, in their view, the evidence at their first trial was insufficient to support their convictions under the definition of "waters of the United States" that the court of appeals held was established by *Rapanos* v. *United States*, 547 U.S. 715 (2006). They further contend (Pet. 15-18) that the court of appeals' determination that retrial would not violate the Double Jeopardy Clause conflicts with decisions of the Fifth, Seventh, and Tenth Circuits. Cross-petitioners appear to base their double jeopardy theory on the assumption that the court of appeals correctly identified the governing rule of law under *Rapanos*. See Pet. 15. If this Court were to grant the government's petition for a writ of certiorari and reverse, however, their double jeopardy issue would not even arise.

In any event, cross-petitioners' conditional request for review lacks merit. The court of appeals correctly concluded that the Double Jeopardy Clause does not bar retrial of cross-petitioners, and the circuits on which cross-petitioners rely would reach the same conclusion. Moreover, this case is not an appropriate vehicle for resolving any tension that may exist among the courts of appeals, because the evidence was sufficient to support cross-petitioners' convictions under any possible interpretation of *Rapanos*.

1. It has long been settled that the Double Jeopardy Clause does not prohibit the government from retrying a defendant whose conviction has been reversed on appeal because of an error in the trial proceedings, including an erroneous jury instruction. *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988); *Burks* v. *United States*, 437 U.S. 1, 14-15 (1978); see *Ball* v. *United States*, 163 U.S. 662, 672 (1896). This Court has identified only one exception to that rule: in *Burks*, the Court held that the Double Jeopardy Clause bars retrial "when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict." *Lockhart*, 488 U.S. at 39 (citing *Burks*, 437 U.S. at 18).

The different treatment of reversal for insufficient evidence and reversal for trial error reflects the principle that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson* v. *United States*, 468 U.S. 317, 325 (1984). "[A]n appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal." *Ibid.* It thus "terminate[s] the initial jeopar-

dy," and the Double Jeopardy Clause prohibits a successive prosecution. *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984). In contrast, when a defendant's conviction has been set aside based on ordinary trial error, he remains in "continuing jeopardy" because the proceedings "have not run their full course." *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). In those circumstances, a fundamental prerequisite for application of the Double Jeopardy Clause is not satisfied, and the Clause does not bar retrial. *Ibid.*; see *Lydon*, 466 U.S. at 308.

In this case, the court of appeals reversed cross-petitioners' convictions based *solely* on a finding of trial error—the conclusion that the jury instructions did not accurately reflect the definition of "waters of the United States" established by this Court's intervening decision in *Rapanos*. Pet. App. 25a-32a. Contrary to cross-petitioners' contention (Pet. 6), the court did *not* conclude that the evidence at trial was legally insufficient. Instead, the court stated that, because it was reversing for instructional error, it "need not evaluate whether there was insufficient evidence that [cross-petitioners'] discharges were into 'navigable waters' as that term is properly defined under *Rapanos*." Pet. App. 31a-32a.

The court of appeals did conclude that the government failed to establish that the instructional error was harmless. Pet. App. 27a-28a. But, as this Court has made clear, "the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *United States* v. *Lane*, 474 U.S. 438, 476-477 & n.20 (1986). The harmless-error inquiry does not seek to determine whether there was sufficient evidence of guilt absent the error, but rather whether the error itself had a substantial influence on the verdict. *Id.* at 476 n.20. Conse-

quently, evidence can be sufficient to support a finding of guilt by a rational jury, see *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), even when the evidence is not so overwhelming that it renders an instructional error harmless beyond a reasonable doubt, *Neder* v. *United States*, 527 U.S. 1, 15-20 (1999). Because the court of appeals reversed cross-petitioners' convictions based on trial error, and the court made no finding that the evidence was legally insufficient to support their convictions, the Double Jeopardy Clause poses no bar to their retrial.

a. This Court's prior decisions preclude cross-petitioners' apparent contention that, under *Burks*, an insufficiency of proof at their first trial would, in and of itself, bar retrial. In *Richardson*, after a judge declared a mistrial when the jury hung, the defendant argued that the Double Jeopardy Clause prohibited his retrial because the government had presented insufficient evidence to convict at the first trial. This Court rejected that claim because "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy." *Richardson*, 468 U.S. at 326. Because there had been no jeopardy-terminating event, such as an acquittal or a judicial finding of insufficient evidence, the Court concluded that Richardson had "no valid double jeopardy claim" "[r]egardless of the sufficiency of the evidence at [his] first trial." *Ibid.*

The Court reached a similar conclusion in *Lydon*, which involved a defendant who, under Massachusetts' two-tier system of trial courts, elected a *de novo* retrial before a jury after he had been convicted at a bench trial. Lydon argued that the Double Jeopardy Clause precluded the retrial because "the evidence at the bench trial was insufficient to convict." 466 U.S. at 307. The

Court rejected that argument, reasoning that, unlike the defendant in *Burks*, "who could rest his claim upon the appellate court's determination of insufficiency," Lydon had "fail[ed] to identify any stage of the state proceedings that can be held to have terminated jeopardy." *Id.* at 309. The Court observed that Lydon "has not been acquitted; he simply maintains that he ought to have been." *Id.* at 307. But a "claim of evidentiary failure and a legal judgment to that effect," the Court held, "have different consequences under the Double Jeopardy Clause." *Id.* at 309.

Richardson and *Lydon* thus make clear that "the *Burks* bar only prevents retrial when the appellate court *in fact* reverses for insufficient evidence." *Vanderbilt* v. *Collins*, 994 F.2d 189, 195 (5th Cir. 1993); accord *Patterson* v. *Haskins*, 470 F.3d 645, 657 (6th Cir.), cert. denied, 128 S. Ct. 90 (2007); *United States* v. *McAleer*, 138 F.3d 852, 856-857 (10th Cir.), cert. denied, 525 U.S. 854 (1998); *United States* v. *Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) (per curiam); *United States* v. *Porter*, 807 F.2d 21, 23-24 (1st Cir. 1986), cert. denied, 481 U.S. 1048 (1987). Because that has not occurred here, the Double Jeopardy Clause does not bar cross-petitioners' retrial.

b. *Richardson* and *Lydon* also refute cross-petitioners' contention (Pet. 6-7) that the Double Jeopardy Clause required the court of appeals to review the sufficiency of the evidence at their first trial under the *Rapanos* standard. In rejecting the double jeopardy claim in *Richardson*, the Court stated that "*Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." *Richardson*, 468 U.S. at 323. The only distinction between *Richardson* and this case is that the jury found cross-petitioners guilty, ra-

ther than hanging. But a defendant has no better double jeopardy claim when the jury has found him guilty, as opposed to failing to reach a verdict, as *Lydon* confirms. In *Lydon*, the Court rejected the defendant's argument "that he [was] entitled under the Federal Constitution to a review of the evidence presented at the bench trial [at which he was found guilty] before proceeding with the second-tier trial." 466 U.S. at 309-310. And "a defendant who elects to be tried *de novo* is in the same position as a convicted defendant who successfully appeals," *i.e.*, neither of them is entitled to a ruling on whether the evidence at the first trial was sufficient. *Id.* at 306. The Double Jeopardy Clause "does not reach so far." *Id.* at 310.

Richardson and *Lydon* thus establish that the Double Jeopardy Clause does not require a court of appeals that has reversed a conviction for instructional error also to decide whether the trial evidence was sufficient under the correct instructions. See *Patterson*, 470 F.3d at 658; *United States* v. *Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992); *United States* v. *Miller*, 952 F.2d 866, 874 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); *United States* v. *Douglas*, 874 F.2d 1145, 1149-1150 (7th Cir.), cert. denied, 493 U.S. 841 (1989). Accordingly, the court below did not err in refusing to evaluate the sufficiency of the evidence at cross-petitioners' first trial under the *Rapanos* standard.[2]

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[2] Contrary to cross-petitioners' contention (Pet. 6-7), *Tibbs* v. *Florida*, 457 U.S. 31 (1982), does not support a different conclusion. In *Tibbs*, the Court held that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence." *Id.* at 32. The Court had no occasion to decide whether the Double Jeopardy Clause compels an appellate

c. Cross-petitioners contend (Pet. 6-15) that the court of appeals erred in reasoning that the Double Jeopardy Clause does not preclude retrial when, as in this case, an instructional error results from an intervening change in the controlling law, and the error deprived the government of the opportunity or incentive to present sufficient evidence under the correct instructions, but the evidence was sufficient under the instructions as given. See Pet. App. 31a (citing *United States* v. *Sanchez-Corcino*, 85 F.3d 549, 554 n.4 (11th Cir. 1996), overruled on other grounds by *Bryan* v. *United States*, 524 U.S. 184 (1998)). That contention lacks merit. As the court of appeals indicated in *Sanchez-Corcino*, 85 F.3d at 554 n.4, its conclusion follows from this Court's decision in *Lockhart*.

In *Lockhart*, this Court held that the Double Jeopardy Clause did not forbid retrial of a defendant under a habitual offender statute where his sentence had been set aside because one of the convictions supporting it had been pardoned. The Court concluded that when a conviction is reversed because the trial court has erroneously admitted certain evidence, the fact that the remaining evidence is insufficient to sustain a conviction does not bar a new trial, provided the evidence is sufficient when the erroneously admitted evidence is considered. *Lockhart*, 488 U.S. at 40-42.

The Court reasoned that "[t]he basis for the *Burks* exception to the general rule" allowing retrial after reversal of a conviction "is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close

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court that has reversed for instructional error also to evaluate the sufficiency of the evidence, and the Court did not address that question.

of all the evidence." *Lockhart*, 488 U.S. at 41. "A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court." *Id.* at 41-42. The Court further reasoned that permitting retrial in such a situation "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.'" *Id.* at 42 (brackets in original) (quoting *Burks*, 437 U.S. at 15). It also serves "the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 38 (citation omitted). As the Court noted, if the district court had made the correct evidentiary ruling at trial, the prosecutor would have had an opportunity to offer additional available evidence. Thus, allowing retrial "merely recreates the situation" that would have existed if the trial court had ruled correctly. *Id.* at 42.

The same analysis applies to the situation where, as in this case, a defendant's conviction is reversed because instructions valid under the law prevailing at the time of trial are determined to be erroneous in light of a newly announced legal standard. An accurate analogy to the trial court's ruling on a motion for a judgment of acquittal requires the appellate court to assess the sufficiency of the evidence under the instructions actually given, not the instructions that are correct under the intervening change in law. Allowing the government to retry the

defendant under the correct legal standard does not countenance the kind of oppression that the Double Jeopardy Clause seeks to prevent. The government structured its case at trial in reliance on prevailing circuit law, and it therefore had no incentive to present evidence that would satisfy the newly announced legal standard. Thus, the evidence actually introduced by the government did "not necessarily reflect all other available evidence." *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980). Indeed, "[i]t is impossible to know what additional evidence the government might have produced had the" correct legal standard been applied at trial. *Ibid.*

If the Double Jeopardy Clause barred retrial in those circumstances, the government would be at risk in relying on prevailing law and on the trial court's rulings. The government would be forced to proffer evidence in support of multiple legal standards to guard against the risk of a change in prevailing circuit law. But evidence related to alternate theories of prosecution likely would be found irrelevant and, hence, disallowed.[3] Prosecutorial resources would be wasted, the trial would be prolonged unnecessarily, and, to the extent evidence of alternative theories was admitted, jurors might be con-

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[3] Indeed, in this case, the district court repeatedly stated that, in light of the then-controlling legal standard, the government need not show that either Avondale Creek or Village Creek is a traditional navigable water, and the court discouraged the development of evidence on the navigability of Village Creek and other tributaries connecting Avondale Creek with the Black Warrior River (which the parties agreed is a traditional navigable water). See, *e.g.*, Tr. 2239-2244 (interrupting testimony that Locust Fork River is a Section 10 water).

fused by extraneous evidence. The Double Jeopardy Clause does not require those undesirable results.[4]

Those courts that have squarely addressed the issue have correctly concluded that retrial in these circumstances does not offend the Double Jeopardy Clause. See *United States* v. *Ellyson*, 326 F.3d 522, 532-535 (4th Cir. 2003); *Sanchez-Corcino*, 85 F.3d at 554 n.4; *United States* v. *Wacker*, 72 F.3d 1453, 1464-1465 (10th Cir. 1996); *United States* v. *Weems*, 49 F.3d 528, 530-531 (9th Cir. 1995). Thus, even assuming that Justice Kennedy's standard provides the controlling rule of law under *Rapanos*, and further assuming that the evidence presented at trial was insufficient to meet that standard, there is no double jeopardy bar to retrial.[5]

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[4] Contrary to cross-petitioners' contention (Pet. 9), *Sanabria* v. *United States*, 437 U.S. 54 (1978), has no bearing on this issue. *Sanabria* stands merely for the proposition that "there is no exception [to the Double Jeopardy Clause] permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous.'" *Id.* at 75 (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because cross-petitioners were not acquitted, *Sanabria* is inapposite.

[5] Cross-petitioners contend (Pet. 10-14) that the reasoning of *Lockhart* should not apply here because, according to them, the government deliberately chose to try this case on a legal theory that it knew to be erroneous. They assert that "[t]he government was on full and fair notice" (Pet. 13) that the instructions given by the trial court were contrary to *SWANCC* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), which (in their view) adopted the "significant nexus" standard that Justice Kennedy later endorsed in his *Rapanos* concurrence. As an initial matter, the premises of cross-petitioners' argument—that Justice Kennedy's concurrence establishes the controlling rule of law under *Rapanos* and that Justice Kennedy's standard was established by *SWANCC*—are incorrect. Moreover, contrary to cross-petitioners' assertions, the jury instructions reflected the prevailing law in the Eleventh Circuit. The standard in the instructions was set forth in *United States* v. *Eidson*, 108 F.3d 1336, 1342 (11th Cir.), cert. denied, 522

2. Cross-petitioners contend (Pet. 15-18) that the conclusion by the court below that retrial would not violate the Double Jeopardy Clause conflicts with decisions of the Fifth, Seventh, and Tenth Circuits. Contrary to that contention, none of those circuits has held that the Double Jeopardy Clause bars a retrial where, as here, the court both reversed the defendant's conviction for instructional error based on an intervening change of law and made no finding that the evidence was insufficient to support the conviction.

a. The Fifth Circuit has squarely held that the Double Jeopardy Clause does not preclude a retrial in these circumstances. In *Miller*, that court reversed the defendants' convictions for mail fraud because of indictment and instructional error based on this Court's intervening decision in *McNally* v. *United States*, 483 U.S. 350 (1987). See *Miller*, 952 F.2d at 869. The government obtained a new indictment, and the defendants sought its dismissal on double jeopardy grounds, arguing that the government had presented insufficient evidence at their first trial to support a conviction under the *McNally* standard. *Id.* at 869-870. The court of appeals rejected that argument. Relying on *Richardson* and *Lydon*, the court held that the Double Jeopardy Clause did not bar the defendants' retrial because the court had reversed their convictions for instructional error without making any finding on the sufficiency of the evidence, and the Double Jeopardy Clause did not require the court to make a sufficiency finding. *Id.* at

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U.S. 899, and 522 U.S. 1004 (1997). In *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (2004), the Eleventh Circuit held that the *Eidson* standard was not altered by this Court's decision in *SWANCC*. Indeed, the district court made clear that it was following Eleventh Circuit precedent in *Eidson* and *Parker*. See 3/2/05 Order.

870-874. *Miller* establishes that the Fifth Circuit, like the court below, would conclude that double jeopardy does not bar cross-petitioners' retrial.

Cross-petitioners contend (Pet. 17) that the decision below conflicts with the Fifth Circuit's decisions in *United States* v. *McPhail*, 112 F.3d 197 (1997), and *United States* v. *Oreira*, 29 F.3d 185 (1994). That is not correct. In both those cases, the Fifth Circuit actually made a finding on the sufficiency of the evidence, see *McPhail*, 112 F.3d at 199-200; *Oreira*, 29 F.3d at 188 n.5, whereas the court below expressly declined to make a finding whether the evidence was sufficient under *Rapanos*, see Pet. App. 31a. Moreover, in neither *McPhail* nor *Oreira* did the Fifth Circuit discuss, much less call into question, its holding in *Miller* that the Double Jeopardy Clause does not require a court of appeals to make a finding on sufficiency once it has reversed for instructional error. Accordingly, the Fifth Circuit's statements about whether double jeopardy precluded retrial in *McPhail* and *Oreira* do not conflict with the Eleventh Circuit's conclusion that double jeopardy does not preclude retrial in this case.

b. Like the Fifth Circuit, the Seventh Circuit has squarely held that the Double Jeopardy Clause does not require a court of appeals to make a finding on the sufficiency of the evidence when the court reverses a defendant's conviction for instructional error. See *Douglas*, 874 F.2d at 1149-1150; *United States* v. *Anderson*, 896 F.2d 1076, 1077-1078 (7th Cir. 1990). And the Seventh Circuit, like the Fifth Circuit, has further held that, absent a finding that the evidence was insufficient, retrial does not violate the Double Jeopardy Clause. See *ibid.* *Douglas* and *Anderson* establish that the Seventh Cir-

cuit also would agree with the court below that double jeopardy does not bar cross-petitioners' retrial.

Contrary to cross-petitioners' contention (Pet. 17), the decision below does not conflict with the Seventh Circuit's decisions in *United States* v. *Jackson*, 103 F.3d 561 (1996), *United States* v. *Robinson*, 96 F.3d 246 (1996), and *United States* v. *Hightower*, 96 F.3d 211 (1996). In all three of those cases, the Seventh Circuit (unlike the court below) made findings on the sufficiency of the evidence. See *Jackson*, 103 F.3d at 569; *Robinson*, 96 F.3d at 250-251; *Hightower*, 96 F.3d at 215. At the same time, the Seventh Circuit did not address, much less question, its holdings in *Douglas* and *Anderson* that the Double Jeopardy Clause does not compel a reviewing court to address evidentiary sufficiency when it reverses for instructional error. Indeed, the Seventh Circuit did not engage in double jeopardy analysis of any kind in any of the cases. Accordingly, those cases do not conflict with the determination of the court below that the Double Jeopardy Clause does not bar cross-petitioners' retrial.

c. Cross-petitioners' claim (Pet. 16 & n.4) that the decision below conflicts with Tenth Circuit cases is also incorrect. The Tenth Circuit, like the court below, has held that the Double Jeopardy Clause does not preclude retrial when an instructional error, caused by an intervening change in the law, has deprived the government of the opportunity or incentive to present sufficient evidence under the correct instructions, and the trial evidence was sufficient under the instructions as given. See *Wacker*, 72 F.3d at 1464-1465.

In *Wacker*, the Tenth Circuit reversed the defendant's conviction for "us[ing]" a firearm during and in relation to a drug trafficking crime, in violation of

18 U.S.C. 924(c), because of instructional error in light of this Court's intervening decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). The court of appeals did not reverse the conviction outright. Instead, it remanded for a retrial, "at which time further evidence on the issue of 'use' [could] be presented." *Wacker*, 72 F.3d at 1465. Noting that the evidence at the initial trial "was sufficient to support a conviction for 'use' of a firearm under [the court's] then-existing standard," *id.* at 1464, the court concluded that the remand would not violate the Double Jeopardy Clause, *id.* at 1465. The court reasoned that allowing retrial would not unfairly give the government a second bite at the apple, because the government "cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial." *Ibid.* (citation omitted). Accordingly, the court concluded that the situation was analogous to *Lockhart* and that the Double Jeopardy Clause does not bar retrial when "a conviction is reversed solely for failure to produce evidence that was not theretofore generally understood to be essential to prove the crime." *Ibid.* (citation omitted). *Wacker* establishes that the Tenth Circuit, like the court below, would conclude that the Double Jeopardy Clause does not bar cross-petitioners' retrial.

Citing *United States* v. *Miller*, 84 F.3d 1244 (10th Cir.), cert. denied, 519 U.S. 985 (1996), and *United States* v. *Smith*, 82 F.3d 1564 (10th Cir. 1996), cross-petitioners argue (Pet. 16 & n.4) that the Tenth Circuit no longer follows *Wacker*. The Tenth Circuit has not so stated, however. Rather, in both *Miller* and *Smith*, the panels mistakenly assumed that *Wacker* held that remand for a new trial is permissible only when the evidence at the first trial was sufficient for the jury to have

returned a guilty verdict "if properly instructed." *Miller*, 84 F.3d at 1258; see *Smith*, 82 F.3d at 1568.[6] On the contrary, as described above, *Wacker* held that remand for a new trial is permitted if the evidence at the first trial was sufficient under the instructions actually given. See 72 F.3d at 1464-1465.

Wacker remains the controlling law in the Tenth Circuit even though it has been misconstrued in some later panel decisions. See *United States* v. *Romero*, 491 F.3d 1173, 1177 (if panel decisions conflict, the earliest decision is binding), cert. denied, 128 S. Ct. 319 (2007). Indeed, in *United States* v. *Pearl*, 324 F.3d 1210, cert. denied, 539 U.S. 934 (2003), the Tenth Circuit's most recent discussion of the subject, the court again applied its analysis in *Wacker* in addressing a change in the law based on an intervening Supreme Court decision. In *Pearl*, the defendant was convicted on child pornography charges. The Tenth Circuit held that the jury instructions were erroneous, under the intervening decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), and reversed and remanded for a new trial, rejecting the defendant's argument that retrial was barred by the Double Jeopardy Clause. The court of appeals explained that the "government 'cannot be held responsible for "failing to muster" evidence sufficient to satisfy a standard * * * which did not exist at the time of trial,' and because this is 'trial error' rather than 'pure insufficiency of evidence,' [the defendant] may be retried without violating double jeopardy." *Pearl*, 324 F.3d at 1214 (quoting *Wacker*, 72 F.3d at 1465). Although the court also commented that the evidence was

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[6] The panel in *United States* v. *Simpson*, 94 F.3d 1373 (10th Cir.), cert. denied, 519 U.S. 975 (1996), which cross-petitioners do not cite, appears to have similarly misread *Wacker*. See *id.* at 1379.

sufficient under the new *Ashcroft* standard, *ibid.*, its basic conclusion, consistent with *Wacker*, was that "[t]he government may retry a defendant whose convictions, as here, are set aside due to trial error without running afoul of the Double Jeopardy Clause," except when "the government produces *no* evidence at trial," *ibid.*, *i.e.*, the evidence was not sufficient under *any* standard. Moreover, any intra-circuit conflict is a matter for the Tenth Circuit, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

d. As cross-petitioners note (Pet. 15-16 n.3), several circuits have adopted a policy that they will review insufficiency claims even when they reverse convictions for instructional or other trial errors. But, as the Fifth Circuit noted in *Miller*, that is not a constitutional requirement: "[i]n general, * * * these cases hold only that an appellate court should, or in the exercise of its discretion normally will, review the sufficiency of the evidence as well even if it has already determined that a conviction must be reversed on other grounds." 952 F.2d at 872. See, *e.g.*, *id.* at 874 (stating that review of sufficiency claims is "the better practice"); *United States* v. *Wallach*, 979 F.2d 912, 918 (2d Cir. 1992) (stating that "we prefer not to subject the defendant to retrial" without considering his sufficiency claim), cert. denied, 508 U.S. 939 (1993); *Bishop*, 959 F.2d at 829 n.11 (explaining that, under *Richardson*, "appellate courts are not *required* to consider sufficiency issues," but "we find nothing in *Richardson* which *prevents* appellate courts from assessing the sufficiency of the evidence if they so wish"); *Douglas*, 874 F.2d at 1150 (adopting "a policy in this circuit of routinely addressing evidentiary sufficiency in criminal cases when a defen-

dant presents the issue on appeal"). The decision of those circuits that, as a policy matter, they will generally review sufficiency claims even when reversing for instructional error, does not conflict with the decision of the court below that the Double Jeopardy Clause did not compel it to determine whether the trial evidence was insufficient under the new standard it drew from *Rapanos*.

Indeed, the Eleventh Circuit has also adopted a prudential policy that it will generally review sufficiency claims even when reversing for trial error. See, *e.g.*, *United States* v. *Bobo*, 419 F.3d 1264, 1268 (2005). Cross-petitioners have not sought this Court's review on the ground that the Eleventh Circuit failed to follow that policy in this case. Nor would that fact-bound claim warrant this Court's review.[7]

3. In all events, this case is not an appropriate vehicle to resolve any tension that may exist among the courts of appeals on how to apply the Double Jeopardy Clause in this context. Cross-petitioners would not have a valid double jeopardy claim regardless of how this Court interpreted the Clause, because the trial evidence was sufficient to support their convictions under any

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[7] The Tenth Circuit too has adopted a policy that it generally will review sufficiency claims even if it reverses a defendant's conviction for trial error. See *United States* v. *Haddock*, 961 F.2d 933, 934, cert. denied, 506 U.S. 828 (1992). Unlike other courts of appeals, the Tenth Circuit has suggested (albeit without any analysis) that its practice is "require[d]" by the Double Jeopardy Clause. *United States* v. *Wiles*, 106 F.3d 1516, 1518, cert. denied, 522 U.S. 947 (1997). But even if the Tenth Circuit were to address a sufficiency claim like cross-petitioners' claim based on an intervening change of the law, under *Wacker*, it would conclude that double jeopardy does not bar retrial where, as here, the evidence was sufficient under the law prevailing at the time of trial. See pp. 18-21, *supra*.

possible interpretation of *Rapanos*. The evidence was sufficient for a reasonable jury to conclude that Avondale Creek, the stream into which cross-petitioners dumped their polluted wastewater, was a "water[] of the United States," 33 U.S.C. 1362(7), under *either* the *Rapanos* plurality's standard *or* Justice Kennedy's "significant nexus" standard.

The *Rapanos* plurality interpreted the term "waters of the United States" to include "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742. As described in the government's petition for a writ of certiorari (at 8-10), clear and unambiguous testimony at trial indicated that Avondale Creek flows continuously to traditional navigable waters—contributing water year-round to Village Creek, Bayview Lake, Locust Fork, and, in turn, the Black Warrior River, which cross-petitioners below conceded is a traditional navigable water, 08-223 Pet. Reply 8.

The evidence was also sufficient to support a jury finding that Avondale Creek has a "significant nexus" to traditional navigable waters under Justice Kennedy's standard. Under that standard, "significance" is determined with reference to the CWA's purpose—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Justice Kennedy also noted that the presence of an "ordinary high-water mark" for ephemeral streams "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Id.* at 781. The evidence at trial established that Avondale Creek is a perennial stream with an estab-

lished bed and bank and that it overflows its over-six-feet high banks after rainstorms. See 08-223 Pet. 8-10 & n.5; Tr. 4552-4554 (testimony that Avondale and Village Creeks carry a "tremendous amount of sediment," "come up fast" after "significant rainfall events," and "can be very dangerous"); Tr. 2027-2028 (Avondale Creek overflows its banks and floods the McWane plant). The evidence further showed that Avondale Creek is capable of transporting pollutants downstream to traditional navigable waters. Tr. 147-148, 170-171, 189, 232 (observation of significant quantities of pollution from McWane pipes flowing into Village Creek); Tr. 1816-1818, 1860-1861, 2130-2132 (observation of McWane's pollutants miles downstream in Village Creek). A rational jury could infer that Avondale Creek has a significant nexus to the downstream traditional navigable waters into which it flows and that its water quality is "likely to play an important role in the integrity of [that] aquatic system." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).

Because the evidence was sufficient to support cross-petitioners' convictions under any possible interpretation of *Rapanos*, this case is not an appropriate vehicle to review cross-petitioners' claim that retrial would violate the Double Jeopardy Clause under what the court below held was the correct *Rapanos* standard.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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